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In The

Supreme Court of the United States

October Term, 1972

No. 72-946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Statement	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes	4
Statement of the Case	5
Reasons for Granting the Writ:	
I. The evidence adduced at the trial failed to show that any money was taken from anyone as a result of any fear or threats induced by defendants or anyone acting in conjunction with them.	7
II. Due process in this case required the granting of a new trial to the petitioner.	12
III. Petitioner was denied due process and a fair trial when the trial court refused to admit Exhibit DM-20 for identification into evidence.	13

Index

Page

IV. Petitioner's rights to be tried only on an indictment found by a Grand Jury were denied when the trial court permitted testimony concerning conversations and transactions with one O'Malley and when it charged that petitioner could be found guilty if he conspired with O'Malley. 15

V. Petitioner's rights to due process were violated when the trial court refused to strike Tobler's identification of petitioner. 17

VI. Petitioner's right to effective assistance of counsel was denied when the trial court unreasonably limited counsel's summation to one hour. 18

VII. Petitioner's right to a fair trial was denied by reason of improper summation. (A) On behalf of the government; (B) on behalf of the co-defendant Powers. 19

VIII. Petitioner's custodial sentence amounted to cruel and inhuman punishment. 20

Conclusion 21

BLURRED C

Index

Page

Table of Citations

CASES CITED:

Bain, Ex Parte, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 15

Callanan v. United States, 223 F.2d 171 (C.C.A. 8) 1955 10

Johnson v. United States, 158 Fed. 67 (C.C.A. 5) 1907 9

Rosenthal v. United States, 276 F. 714 (C.C.A. 9) 1921 12

Rossi v. United States, 9 F.2d 363 (C.C. 8) 1925 19

Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270 (1960) 15

United States v. Addonizio, 451 F.2d 49 (C.C.A. 3) 1972 . . . . . 8, 10

United States v. Borelli, 336 F.2d 376 (C.C.A. 2) 1964 13

United States v. Critchley, 353 F.2d 358 C.C.A. 3) (1965) 16

United States v. Kennedy, 291 F.2d 457 (C.C.A. 2) 1961 10

D COPY

Page

United States v. Kenny, 462 F.2d 1205 (C.C.A. 3) 1972, cert. denied 41 L.W. 3207 . . . . . 9, 10

UNITED STATES CONSTITUTION CITED:

Fifth Amendment 2, 3, 4

Sixth Amendment 4, 5

Eighth Amendment 4, 5

STATUTES CITED:

18 U.S.C. §1951 . . . . . 2, 4, 5, 9

18 U.S.C. §3500 . . . . . 6, 13

28 U.S.C.A. §1254-1 2

Appendix

Appendix A — Order 1a

Appendix B — 18 United States Code §1951. . 3a

Appendix C — Indictment 4a

Appendix D — Excerpts of Transcript . . . 19a

Appendix E — Document 23a

Index

Page

Appendix F — Excerpts from Trial Transcript of Testimony of Raymond Tobler. . 27a

Appendix G — Excerpts from Trial Transcript of Testimony of Frank B. Siegel. . . 32a

Appendix H — Excerpts from Trial Transcript of Testimony of Louis Rassner. . . 33a

Appendix I — Excerpts from Trial Transcript of Summation of Counsel 35a

Appendix J — Excerpts from Trial Transcript of Judge's Charge to the Jury . . . 38a

Appendix K — Excerpt from Transcript of Proceedings at Sentencing, July 10, 1972. . 39a

Appendix L — Excerpt from Bill of Particulars Served by the Government on January 21, 1972 . . . . . 41a

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No.

PATRICK MUSTO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement

Petitioner, Patrick Musto, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 13, 1972.

Opinions Below

The judgment of conviction and sentence of the United States District Court for the District

of New Jersey is not officially reported. The United States Court of Appeals for the Third Circuit filed no opinion but entered an order on December 13, 1972, affirming the judgment below. The Order is attached as Appendix A to this petition.

Jurisdiction

Petitioner Patrick Musto was, on May 5, 1972, convicted in the United States District Court for the District of New Jersey on nine counts of violating Title 18 U.S.C. §1951 (a co-defendant Joseph D. Lugosch was convicted on four counts and another co-defendant John Powers was acquitted on all counts).

On June 26, 1972, this petitioner moved for a new trial, judgment of acquittal and arrest of judgment, which motion was denied.

On July 10, 1972, this petitioner was sentenced to a custodial term of two and one-half years and was fined $20,000.00. This judgment was appealed to the United States Court of Appeals for the Third Circuit. On December 13, 1972, the United States Court of Appeals for the Third Circuit entered an order affirming the judgment of the United States District Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1254-1.

Questions Presented

1. Whether petitioner's rights under the Fifth Amendment of the Constitution of the United

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States were denied when the trial court denied petitioner's motion for an acquittal on the grounds that the government had not proved a violation of the statute for which he was indicted and had failed to prove his connection with the alleged conspiracy.

2. Whether petitioner's rights under the Fifth Amendment of the Constitution of the United States were violated when the trial court denied petitioner's motion for a new trial, judgment of acquittal and the arrest of judgment.

3. Whether petitioner's rights under the Fifth Amendment of the Constitution of the United States were violated when the trial court refused to admit in evidence petitioner's Exhibit DM-20 for identification.

4. Whether petitioner's rights under the Fifth Amendment of the Constitution of the United States were violated when the trial court admitted conversations and transactions with one O'Malley who had not been charged as a co-conspirator in the indictment.

5. Whether the petitioner's rights under the Fifth Amendment of the Constitution of the United States were violated when the trial court charged that petitioner could be convicted if the jury found that he conspired with O'Malley who was not charged as a co-conspirator in the indictment.

6. Whether petitioner's rights under the Fifth Amendment of the Constitution of the United States were violated when the trial court refused to

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strike the testimony of the witness, Tobler, insofar as his attempt to connect this petitioner with the alleged conspiracy was concerned and in permitting the jury to consider said testimony.

7. Whether petitioner's rights under the Sixth Amendment of the Constitution of the United States to effective assistance of counsel were violated when the trial court unreasonably limited counsel's summation to one hour.

8. Whether petitioner's rights to a fair and impartial trial were violated by the summation of (a) counsel for the government and (b) counsel for the co-defendant Powers.

9. Whether petitioner's rights under the Eighth Amendment of the Constitution of the United States were violated by the imposition of a two and one-half year custodial sentence and a fine of $20,000.00.

Constitutional Provisions and Statutes

United States Code:

18 United States Code §1951 (Appendix B)

Constitutional Provisions

United States Constitution:

Fifth Amendment:

"No person shall be held to answer for

> a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty or property without due process of law. . . ."

Sixth Amendment:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Eighth Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Statement of the Case

The petitioner together with four others was charged in a nine count indictment in the United States District Court for the District of New Jersey with violation of the Hobbs Act, 18 U.S.C. §1951 (Appendix C). The first count charged a conspiracy. The other eight counts were substantive counts. Immediately before trial, the defendants, Schatell and Holtje, were severed and the trial proceeded against the petitioner and the defendants Lugosch and Powers. Twenty-two witnesses testified on behalf of the government. One, John W. Fenton, testified that at least once he delivered a list to this petitioner and petitioner told him he knew what to do with the list and, after collecting money from some of the alleged

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victims, he gave the money to the petitioner (Appendix D). On cross-examination he was asked concerning a statement that he had given the F.B.I. (DM-20 for identification) (Appendix E) which statement had been given to counsel by the government pursuant to requirements of 18 U.S.C. §3500. Thereafter the statement was offered in evidence and was rejected by the trial court on the ground that the F.B.I. agents had not been called to establish its authenticity.

Another witness, Tobler, had attempted to connect this petitioner with the alleged conspiracy (Appendix F). When it developed on cross-examination that the conversation referred to was by telephone, a motion was made to strike the testimony insofar as the attempt to connect this petition was concerned, and was denied.

The jury found this petitioner guilty on all nine counts. It found Powers not guilty and found the defendant Lugosch guilty on the first five counts of the indictment.

A motion was then made for a new trial, judgment of acquittal and arrest of judgment, which was denied.

On July 10, 1972, petitioner was sentenced to a custodial sentence of two and one-half years and fined a total of $20,000.00. An appeal was taken to the United States Court of Appeals for the Third Circuit and the judgment of the District Court was affirmed by the United States Court of Appeals for the Third Circuit on December 13, 1972.

On these facts, petitioner applies for the Writ of Certiorari.

Reasons for Granting the Writ

I.

THE EVIDENCE ADDUCED AT THE TRIAL FAILED TO SHOW THAT ANY MONEY WAS TAKEN FROM ANYONE AS A RESULT OF ANY FEAR OR THREATS INDUCED BY DEFENDANTS OR ANYONE ACTING IN CONJUNCTION WITH THEM.

The Bill of Particulars served by the government (Appendix L) advised the defendants that the extortion was induced both by fear of — or by the wrongful use of fear of — financial injury and claimed that the fear of the victims was (1) that they would not obtain future contracts to be performed on behalf of the Board of Education; (2) that they would not be compensated for services rendered on existing contracts; (3) that payments due them for services rendered would be delayed; and (4) that they would be unable to meet expenses in the course of contracts.

The government admitted there was absolutely no testimony concerning items 2, 3 and 4 and relied only on item 1. As to that item there is absolutely no testimony by any of the alleged victims that anyone, charged either as defendants or co-conspirators, told them that they would not obtain future contracts to be performed on behalf of the Union City Board of Education unless they

paid any money. For example, the witness Frank B. Siegel testified that no one ever said or indicated to him that if he didn't pay ten percent he wouldn't get the business or would not get future business (Appendix G).

Under those circumstances how could the petitioner have been found guilty on Count Six of the indictment?

Then again, the witness Rassner testified that the amounts of the payments varied anywhere from five to ten percent and that the amounts he gave were solely in his discretion and that when he reduced the payments there was no complaint (Appendix H).

Under those circumstances, how could the petitioner have been found guilty on Count Seven of the indictment?

All of the testimony concerning bids indicated that all bids were invariably awarded to the lowest bidder, whether that lowest bidder paid or did not pay any money. Contrast this with United States v. Addonizio, 451 F.2d 49 (C.C.A. 3) 1972, where the Court said, (p. 73):

> "Contractors, engineers, and suppliers, for example, have a right to expect that when they incur time and expense to bid on public projects, they will be awarded contracts when their bids are lowest, and that they will subsequently enjoy the full financial benefits of their efficiency and industry. The City of Newark had systematically destroyed this right."

Furthermore, with reference to Counts Two, Three, Four and Five of the indictment the testimony was that these contractors would add a certain sum to their contract with the Board and, when they received payment from the Board, would give that added money to a collector.

In United States v. Kenny, 462 F.2d 1205 (C.C.A. 3) 1972, cert. denied 41 L. W. 3207, the Court, referring to false invoices to the County of Hudson said (p. 1224):

> "The testimony with respect to the false invoices for cars delivered to Kropke and Robbins did not technically establish the offense of extortion or bribery under New Jersey law since DeFeo was paid by the County."

Here also there was no extortion from the defendants for the monies were taken from the Board of Education.

It is further submitted that by these acts the contractors became particeps criminis and that under Johnson v. United States, 158 Fed. 67 (C. C.A. 5) 1907 the petitioner could not be found guilty of any extortion from them or of any conspiracy to commit extortion from them.

The basic question, however, in this case is whether the Hobbs Act (18 U.S.C. 1951) under which petitioner was convicted can be extended to cover a case where there was absolutely no threats and no fear imposed by the defendants or anyone acting in conjunction with them. This Act speaks

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in terms of robbery, force, coercion and extortion. The maximum penalty thereunder is one of the most severe in the entire code. It is twenty years on each count. What Congress intended to do was to reach threatened violent crimes. There must be real threats and real fear.

In this case there was no perversion of competitive bidding or withholding of payment for work already done or any threat that contracts would not be awarded to anyone unwilling to kick back as set forth in United States v. Kenny, supra and United States v. Addonizio, supra. We find here no sudden unexplained wealth as in United States v. Kenny, supra.

In Callanan v. United States, 223 F.2d 171 (C.C.A. 8) 1955 the Court held (p. 175):

> "It appears to us that the offense of extortion under the Hobbs Act has been committed if the defendants have illegally created fear in their victim, which fear has induced the victim to part with his money or property." (Emphasis added.)

In United States v. Kennedy, 291 F.2d 457 (C.C.A. 2) 1961 the Court said (p. 459):

> "In my view it was error to receive evidence of threats to informants not called as witnesses, even to prove the victim's state of mind; for his state of mind is irrelevant unless it springs from action by the defendant and the hearsay rule forbids the use of the informant's statement to show that this had occurred. Where the sole

evidence offered by the prosecution in an extortion case was a victim's testimony that he had paid money to the defendant because numerous other persons, not called as witnesses, had told him of threats by the defendant under similar circumstances, I should suppose a court would reverse for violation of the hearsay rule and not, as my brothers think, for insufficiency of the evidence; if that be so, I cannot see it is any the less error to receive such evidence where the testimony of threats to informants not called as witnesses is merely superimposed upon testimony as to fear caused by threats to informants who were so called or to the victim himself."

It is respectfully submitted that nowhere in the testimony was there any statement connecting the defendants with any threats or with any action that put the suppliers in fear of losing any business.

Undoubtedly the testimony revealed violations of the law, but it did not amount to a violation of the Hobbs Act or of any other Federal law.

It is respectfully submitted that the government of the United States is not the conscience of the fifty various states. Each state can be relied upon to enforce its own criminal laws. If there has been a violation of the laws of the State of New Jersey in this case, the state has the power and the ability to vindicate any such violation. That duty and the power belong exclusively to the state and not to the Federal

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government. The government has attempted to stretch the provisions of the Hobbs Act far beyond what Congress originally intended to interdict and far beyond any previously reported case.

II.

DUE PROCESS IN THIS CASE REQUIRED THE GRANTING OF A NEW TRIAL TO THE PETITIONER.

At the trial twenty-two witnesses testified for the government. Of these only three connected the petitioner with the charges, Castorino, Fenton and Tobler. Castorino had testified that when he received the money he and the defendant Powers divided it into shares; that Powers took one share and that he kept one share and gave another share to the petitioner. The jury, by acquitting the defendant Powers certainly did not believe Castorino when he testified that he and Powers divided this money into shares. They did not believe Castorino when he testified that Powers took one share for himself. How then could the jury believe Castorino when he testified that one of the shares that he and Powers divided was given by him to Musto?

Clearly, the verdict, on the very same evidence on which Powers was acquitted, was inconsistent and a new trial should have been granted on the authority of Rosenthal v. United States, 276 F. 714 (C.C.A. 9) 1921.

Even if Rosenthal does not apply, we must assume that the jury in finding the petitioner guilty must have relied on the testimony of Fenton

and Tobler. The error committed by the trial court with respect to the Fenton testimony is discussed, infra, under Point III. The error with respect to the admission of Tobler's testimony is discussed, infra, under Point V.

III.

PETITIONER WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT REFUSED TO ADMIT EXHIBIT DM-20 FOR IDENTIFICATION INTO EVIDENCE.

When Fenton took the stand the government pursuant to 18 U.S.C. Section 3500 handed counsel the statement made by Fenton to the F.B.I. (Appendix E). On cross examination Fenton denied that he told the F.B.I. agents that when Galasso died he was told by either Savarine or Dr. Philip Castorino, Galasso's replacement on the Board, that when he gets the list to see Castorino (T654). He further stated that he did not recall saying that from then on he delivered the checks to Dr. Castorino (T655). This exhibit was then offered in evidence (T3044) which offer was rejected by the Court on the ground that the F.B.I. agents had not been called to prove the statement and to establish its authenticity.

It is submitted that there was no requirement upon the defendant to authenticate the statement. This exhibit was delivered by the Government pursuant to Section 3500 of the Code. It was the Government who represented that this was a statement made by Fenton and as such was admissable without aliunde proof. In United States

v. Borelli, 336 F.2d 376 (C.C.A. 2) 1964, the Court held at page 392:

> "It remains to deal briefly with certain rulings on questions of evidence that may recur on a new trial. Two of these related to the examination of Ager. The defense had questioned him as to a statement he had given to the Government, in which he minimized his acquaintance with Bourbonnais and denied making any deliveries; Ager said the prior statement was false, and the judge then declined to receive it. The judge should have permitted the written statement to be introduced as affecting Ager's credibility rather than to force the defense to rely for impeachment solely on Ager's fleeting oral admission that he had lied on the earlier questioning."

A fiortiori the statement should have been admitted here because it was in direct contradiction to the witness' testimony that after Galasso died it was Musto who told him to see Castorino. The Court below by refusing to admit this statement made it impossible for Musto to contradict Fenton's testimony most effectively.

IV.

PETITIONER'S RIGHTS TO BE TRIED ONLY ON AN INDICTMENT FOUND BY A GRAND JURY WERE DENIED WHEN THE TRIAL COURT PERMITTED TESTIMONY CONCERNING CONVERSATIONS AND TRANSACTIONS WITH ONE O'MALLEY AND WHEN IT CHARGED THAT PETITIONER COULD BE FOUND GUILTY IF HE CONSPIRED WITH O'MALLEY.

In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960) this Court said (p. 215):

> "Ever since Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849, was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."

The Court went on to say, (p. 217):

> "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."

(p. 218):

> "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment."

And a defective indictment cannot be cured by a bill of particulars. United States v. Critchley, 353 F.2d 358 C.C.A. 3 (1965).

Paragraph 14 of the indictment (Appendix C) charges five defendants with conspiring among themselves and also with five other persons named as conspirators but not charged as defendants. Four witnesses testified over objection of the petitioner as to transactions or conversations with a Mr. O'Malley who is not named in the indictment. There was testimony that O'Malley collected money from them but there is absolutely no testimony as to what happened to that money. The only statement connecting O'Malley with the conspiracy was the representation of the government that O'Malley is very much a part of the conspiracy. The grand jury did not charge the petitioner with conspiring with O'Malley. It charged him with conspiring with nine other people. It is to be noted that nowhere in the indictment does the grand jury charge a conspiracy with any other person either known or unknown. The testimony was therefore clearly inadmissable.

The error of the trial court is further compounded by the fact that none of the witnesses who testified concerning O'Malley is charged with being a victim of the conspiracy and this error was doubly compounded when the court in its charge to the jury (Appendix J) said that the defendants could not be found guilty unless there was at least one other person who participated with them in the conspiracy and that other person must be another person named in the indictment "or it could be in this case Mr. O'Malley." Thus error upon error was committed.

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V.

PETITIONER'S RIGHTS TO DUE PROCESS RE VIOLATED WHEN THE TRIAL COURT USED TO STRIKE TOBLER'S IDENTIFICATION OF PETITIONER.

The entire testimony of Tobler dealing with attempted identification of the petitioner is forth in Appendix F. It is to be noted that here in his direct examination did Tobler r to a telephone call by Musto. It was only cross examination that it developed that the ersation was by telephone and he finally itted that he honestly did not know who made telephone call. The United States attorney he motion to strike represented to the court Tobler had testified on direct that "he be- d that the person who made the telephone (emphasis mine) was Mr. Musto. It came lear." He of course mistakenly characterized testimony and the court, in accepting that acterization was also mistaken when it said member that."

he tremendous harm to the defendant in re- g to strike the testimony is twofold. First, ttempted to connect the petitioner with an hat occurred about ten years ago, whereas estimony of Fenton and Castorino did not go er back than 1968. Secondly, it is the only nony given by a person who is not charged co-conspirator that attempts to connect this oner with the charges herein.

he government's summation referred to a iracy that had been going on for ten or fifteen

years and this testimony, no matter how weak, could have influenced the jury to bring in a verdict of guilty.

It is submitted that petitioner should not be deprived of his liberty on such a thin and gossamer thread of testimony that a witness "believed" it was petitioner who spoke to him on the telephone some ten years ago, but couldn't honestly say it was [redacted].

VI.

PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN THE TRIAL COURT UNREASONABLY LIMITED COUNSEL'S SUMMATION TO ONE HOUR.

The summation on behalf of this petitioner is found on pp. 3329-3363 of the transcript — a total of 33 pages. The first 26 pages of the summation dealt with testimony of the alleged victims. The next 5 pages dealt with Fenton's testimony and the last three pages dealt with Castorino's testimony. When counsel was one-third through discussing Castorino's testimony the court tapped his pencil to note that the counsel's time for summation was rapidly drawing to a close and counsel was unable because of the limitation of the time to properly discuss Castorino's testimony. Castorino's testimony fell apart when one examines closely his financial situation and apparently the fact that much of the monies that were allegedly extorted found their way into Castorino's pocket. Castorino's enmity to the petitioner was brought out on cross examina-

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tion. His desire to become president of the Board of Education and other matters which required much more discussion than was permitted to counsel by the Court.

The reason given by the Court for the limitation of time was the convenience of the jury. But the right of closing argument is a Constitutional right and in many cases the cause can be won or lost in final argument. Convenience of the jury or of the Court or of anyone else cannot be considered where the Constitutional rights of the defendant are involved. Rossi v. United States, 9 F.2d 363 C.C. 8 (1925) p. 368.

VII.

PETITIONER'S RIGHT TO A FAIR TRIAL WAS DENIED BY REASON OF IMPROPER SUMMATION. (A) ON BEHALF OF THE GOVERNMENT; (B) ON BEHALF OF THE CO-DEFENDANT POWERS.

The exhibits attached to pretrial motions herein show that there has been a great deal of publicity about corruption in Hudson County. Many public officials in Hudson County have been convicted of crime in both the Federal and State Courts resulting in extensive statewide and nationwide publicity in newspapers, radio and television. One of the judges of the District Court in sentencing a public official of Hudson County spoke of the corruption in Hudson County and his remarks were given wide publicity in the news media. With this background we have the United States Attorney making a reference to Hudson

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County in his summation (Appendix I) and instead of confining himself to the guilt or innocence of the petitioner under indictment he talks about Mayor Musto, the son of this petitioner, and charges him with being a mastermind of this conspiracy. This action of the United States Attorney is clearly in line with what was told to defendant Lugosch when he was summoned by Mr. Heifitz, a United States Attorney, Mr. Vaccarino and Mr. Pino, members of the F.B.I. when he was told "We want Musto." and that "You are not involved in it, but you have to help us to get Bill Musto."

The petitioner was also prejudiced by the summation of counsel for the co-defendant Powers who identified him with one who came to this earth to make the world a better place to live in and who ended up being hung between two thieves and when he further said, since John Powers has been on the Board of Education there has been a breath of life, there has been a change. These remarks together with the remarks of the prosecution were bound to create such prejudice in the minds of the jury as to cause them to convict the petitioner although they acquitted the defendant Powers on the very same testimony.

VIII.

PETITIONER'S CUSTODIAL SENTENCE AMOUNTED TO CRUEL AND INHUMAN PUNISHMENT.

Petitioner is 79 years old. His record is impeccable. He had never been charged or con-

victed with any crime before this. His record of public service was long and honorable. As the Court said, his pre-sentence report was excellent and concluded with the statement that his present conviction is in opposition to the image created by his life (Appendix K). Despite his age, which gave him according to the life expectancy tables a life expectancy of 6.33 years, the Court sentenced him to a custodial term of two and one-half years. Imprisonment at his age could do nothing but shorten his life expectancy. It is submitted that the Court in equating this crime with one of treason actually in considering the sentence was very much mindful of treason when it gave him what practically amounted to a life sentence in this case.

Conclusion

For the foregoing reasons, all of which contributed to denying the petitioner a fair and just trial, petitioner's Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit should be granted.

Dated: Union City, New Jersey

December 29, 1972

Respectfully submitted,

Joseph L. Frieman
Attorney for and of Counsel with Petitioner

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APPENDIX A

Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1735

- -x

UNITED STATES OF AMERICA

vs.

PATRICK MUSTO, et al.,

PATRICK MUSTO,

Appellant

- -x

(D.C. Criminal No. 260-71)

Appeal from the United States District Court for the District of New Jersey.

Argued December 12, 1972

Before: SEITZ, Chief Judge, and ALDISERT, and ROSENN, Circuit Judges.

After consideration of the contentions raised by appellant that (1) the indictment did not set

forth reasonable particularities; (2) the court erred in denying the motion for judgment of acquittal; (3) the court placed an unreasonable time limitation on defense counsel's closing argument; (4) the court erred in its charge to the jury; (5) the court erred in refusing to strike the testimony of witness Tobler relating to his identification of appellant; (6) the court erred in refusing to admit into evidence appellant's Exhibit DM20; (7) the court erred in permitting the testimony of witness Siegal regarding alleged fear; (8) the court erred in admitting the testimony of witnesses Sherry, DeNicola, Marks, Rank and Tobler; (9) the court erred in permitting testimony concerning conversations or transactions with O'Malley; (10) the court erred in denying appellant's motions for a new trial because of an alleged inconsistency in the verdicts, because the alleged victims of the conspiracy were actually co-conspirators and because of improper summation of the prosecutor; and (11) that the sentence was illegal because the fine was excessive and the sentence amounted to cruel and unusual punishment;

It is O R D E R E D that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Aldisert
Circuit Judge

Dated: DEC 13 1972

APPENDIX B

18 United States Code §1951

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

. . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

APPENDIX C

Indictment

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

- - - - - - - - - - - - - - - - -x :

UNITED STATES OF AMERICA :

v. :

PATRICK MUSTO, JOHN J. POWERS, NATHAN SCHATELL, PERCY HOLTJE and JOSEPH D. LUGOSCH, :

Defendants :

- - - - - - - - - - - - - - - - -x

The Grand Jury in and for the District of New Jersey, sitting at Newark, New Jersey, charges:

COUNT ONE

1. At all times pertinent hereto, Antinori Brothers; Bartolucci and Son, Incorporated; Benjamin L. Sitterle and Son; Pascale and Macaluso; F. I. Siegel and Son, Incorporated; Lou Rassner Sports Center; Royal Cleaners; and Adelman's Stationery Company, Incorporated, were business concerns in the State of New Jersey.

2. At all times pertinent hereto, the defendant PATRICK MUSTO was President of the Union City Board of Education.

3. At all times pertinent hereto, the defendant NATHAN SCHATELL was a member of the Union City Board of Education.

4. At all times pertinent hereto, the defendant PERCY HOLTJE was a member of the Union City Board of Education.

5. The defendant JOHN J. POWERS was appointed to the Union City Board of Education in October 1968.

6. At all times pertinent hereto, the defendant JOSEPH D. LUGOSCH was the Union City Board of Education School Architect.

7. At all times pertinent hereto, Antinori Brothers; Bartolucci and Son, Incorporated; Benjamin L. Sitterly and Son; and Pascale and Macaluso were engaged in the performance of contracts with the Union City Board of Education for school construction and maintenance which performance depended upon interstate commerce for materials, equipment and supplies.

8. At all times pertinent hereto, F. I. Siegel and Son, Incorporated; Lou Rassner's Sports Center; Royal Cleaners and Adelman's Stationery Company, Incorporated, were engaged in the performance of contracts with the Union City Board of Education for supplying materials and equipment to schools which performance depended upon interstate commerce for materials, supplies and processing.

Indictment

9. Dr. Philip F. Castorino became a member of the Union City Board of Eduction on December 21, 1966.

10. Peter P. Savarine was appointed Secretary to the Union City Board of Education on January 1, 1967.

11. John Fenton was appointed Maintenance Supervisor of the Union City Board of Education in 1967.

12. Thomas Nolan served as Secretary to the Union City Board of Education in 1966.

13. Albert Galasso a/k/a "Chappie" was a member of the Union City Board of Education from April 1966 to his death in 1968.

14. Between on or about April 1966, and on or about December 1970, the exact dates being unknown to the Grand Jury, in the District of New Jersey, the defendants,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

and Dr. Philip F. Castorino, Peter P. Savarine, John Fenton, Thomas Nolan and Albert Galasso a/k/a "Chappie," named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and

agreed together, and with each other, to obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities in such commerce, by extortion, as that term is defined in Section 1951 of Title 18, United States Code.

It was a part of said conspiracy that the said defendants would obtain from the business concerns named in paragraph 1 of this Count, property, to wit, a quantity of United States currency, with the consent of said business concerns, their officers and agents, such consent to be induced by the wrongful use of fear of financial and economic injury to the business of said concerns by the said defendants.

In violation of Title 18, United States Code, Section 1951.

The Grand Jury Further Charges:

COUNT TWO

1. That at all times pertinent hereto, Antinori Brothers was a business concern engaged in the construction business within the State of New Jersey.

2. That between in or about April 1966, and in or about December 1970, Antinori Brothers was engaged in performing construction and maintenance work for the Union City School Board, the

performance of which work depended upon interstate commerce for materials, equipment and supplies.

3. That between in or about April 1966, and in or about December 1970, in the District of New Jersey, the defendants herein

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count, by extortion, as extortion is defined by Section 1951 of Title 18, United States Code, in that: the defendants obtained property, to wit, money from Antinori Brothers, its officers and its agents, with the consent of Antinori Brothers, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

The Grand Jury Further Charges:

Indictment

COUNT THREE

1. That at all times pertinent hereto, Bartolucci and Son, Incorporated, was a business concern engaged in the construction business within the State of New Jersey.

2. That between in or about April 1966, and in or about December 1970, Bartolucci and Son, Incorporated, was engaged in performimg construction and maintenance work for the Union City School Board, the performance of which work depended upon interstate commerce, for materials, equipment and supplies.

3. That between in or about April 1966, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully and unlawfully and feloniously obstruct,delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is defined by Section 1951 of Title 18, United States

Code, in that: the defendants obtained property, to wit, money from Bartolucci and Son, Incorporated, its officers and its agents, with the consent of Bartolucci and Son, Incorporated, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

The Grand Jury Further Charges:

COUNT FOUR

1. That at all times pertinent hereto, Benjamin L. Sitterle and Son, was a business concern engaged in the construction business within the State of New Jersey.

2. That between in or about April 1966, and in or about December 1970, Benjamin L. Sitterle and Son, was engaged in performing construction and maintenance work for the Union City School Board, the performance of which work depended upon interstate commerce for materials, equipment and supplies.

3. That between in or about April 1966, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is defined by Section 1951 of Title 18, United States Code, in that: the defendants obtained property, to wit, money from Benjamin L. Sitterle and Son, its officers and its agents, with the consent of Benjamin L. Sitterle and Son, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

The Grand Jury Further Charges:

COUNT FIVE

1. That at all times pertinent hereto, Pascale and Macaluso, was a business concern engaged in the construction business within the State of New Jersey.

2. That between in or about April 1966, and in

or about December 1970, Pascale and Macaluso, was engaged in performing construction and maintenance work for the Union City School Board, the performance of which work depended upon interstate commerce for materials, equipment and supplies.

3. That between in or about April 1966, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is defined by Section 1951 of Title 18, United States Code, in that: the defendants obtained property, to wit, money from Pascale and Macaluso, its officers and its agents, with the consent of Pascale and Macaluso, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

Indictment

The Grand Jury Further Charges:

COUNT SIX

1. That at all times pertinent hereto, F. I. Siegel and Son, Incorporated, was a corporation engaged in the paint supply business within the State of New Jersey.

2. That between in or about August 1968, and in or about December, 1970, F. I. Siegel and Son, Incorporated, was engaged in supplying materials and equipment for the Union City School Board, the performance of which supply work depended upon interstate commerce for materials and equipment.

3. That between in or about August 1968, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is defined by

Section 1951 of Title 18, United States Code, in that: the defendants obtained property, to wit, money from F.I. Siegel and Son, Incorporated, its officers and its agents, with the consent of F.I. Siegel and Son, Incorporated, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

The Grand Jury Further Charges:

COUNT SEVEN

1. That at all times pertinent hereto, Lou Rassner's Sports Center was a business concern engaged in the sporting goods business within the State of New Jersey.

2. That between in or about July 1968, and in or about December 1970, Lou Rassner's Sports Center was engaged in supplying materials and equipment for the Union City School Board, the performance of which supply work depended upon interstate commerce for materials and equipment.

3. That between in or about July 1968, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is defined by Section 1951 of Title 18, United States Code, in that: the defendants obtained property, to wit, money from Lou Rassner's Sports Center, its officers and its agents, with the consent of Lou Rassner's Sports Center, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

The Grand Jury Further Charges:

COUNT EIGHT

1. That at all times pertinent hereto, Royal Cleaners was a business concern engaged in the dry cleaning business within the State of New Jersey.

2. That between in or about April 1966, and in or about December 1970, Royal Cleaners was engaged in dry cleaning work for the Union City School Board, the performance of which work depended upon interstate commerce.

3. That between in or about April, 1966, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is defined by Section 1951 of Title 18, United States Code, in that: the defendants obtained property, to wit, money from Royal Cleaners, its officers and its agents, with the consent of Royal Cleaners, its agents and officers, such consent having been induced by the wrongful use of fear and of financial injury.

In violation of Title 18, United States Code, Section 1951.

Indictment

The Grand Jury Further Charges:

COUNT NINE

1. That at all times pertinent hereto, Adelman's Stationery Company, Incorporated, was a business concern engaged in the stationery business within the State of New Jersey.

2. That between in or about April 1966, and in or about December 1970, Adelman's Stationery Company, Incorporated, was engaged in supplying materials and equipment for the Union City School Board, the performance of which supply work depended upon interstate commerce for materials and equipment.

3. That between in or about April 1966, and in or about December 1970, in the District of New Jersey, the defendants herein,

PATRICK MUSTO
JOHN J. POWERS
NATHAN SCHATELL
PERCY HOLTJE
JOSEPH D. LUGOSCH

did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect commerce as that term is defined in Section 1951 of Title 18, United States Code, to wit, the movement in such commerce of materials, equipment and supplies in connection with the work referred to in paragraph 2 of this Count by extortion, as extortion is de-

fined in Section 1951 of Title 18, United States Code, in that: the defendants obtained property to wit, money from Adelman's Stationery Company, Incorporated, its officers and its agents, with the consent of Adelman's Stationery Company, Incorporated, its officers and its agents, such consent having been induced by the wrongful use of fear of financial injury.

In violation of Title 18, United States Code, Section 1951.

A TRUE BILL:

FOREMAN

HERBERT J. STERN
United States Attorney

JOHN R. BARTELS, Jr.
Attorney in Charge
Newark Strike Force

APPENDIX D

Excerpts of Transcript

Excerpts from trial transcript of testimony of John W. Fenton:

Direct Examination

[Commencing at 607-24]:

Q. Can you tell the Court and the jury, sir, what the circumstances surrounding your continuation were? A. Well, next month I was given an envelope by Mrs. [608] Camilli and it had Mr. Musto's name on it, and I was told to take it down to Mr. Musto's house, which I did.

Q. What, if anything, happened at Mr. Musto's house? A. I took the envelope down, Mr. Musto opened it up.

Q. What was on that sheet, sir? A. Well, there were names of different companies with an amount alongside of them.

Q. What, if anything, did Mr. Musto say to you? A. Well, all he said, "You know what to do with this, Bill."

Q. What did you do with this? A. I went out and I collected the same as I did previously.

Q. What did you do with these collections, sir? A. I took the collections back and I gave them to Mr. Musto.

Q. Where did you give it to Mr. Musto? A. In his home.

Q. How many times did this happen?

Excerpts of Transcript

A. Once, that I recall, because Mr. Musto says to me, "From now on Phil is going to handle this."

Q. Who is Phil, sir? A. Phil is Dr. Castorino.

* * *

Cross Examination

[Commencing at 653-22]:

Q. Mr. Fenton, did you on December 14, 1970, give a statement to the Federal Bureau of Investigation? A. Yes, I wouldn't say the 14th, but it was — could have been the 14th or 15th. It was approximately that date, I would think.

[654] Q. And where was this? A. This was in the City of Union City.

Q. And do you know the exact place where you gave this statement? A. Yes. Two FBI men spoke to me down around 4th Street in Union City.

Q. Was it 2nd Street — A. It could have been 2nd Street.

Q. On New York Avenue? A. It wasn't New York Avenue. It was between New York Avenue, right alongside the tennis courts. But it was not on New York Avenue. It could have been New York Avenue but it was on the street. It wasn't on the avenue.

Q. Did you tell them that Galasso died you were told by either Savarine or Dr.

Philip F. Castorino, Galasso's replacement on the Board, that when you get the list to see Castorino? A. No, sir.

Q. You did not tell them that? A. No, sir. I don't recall — I do not recall telling them that.

Q. Would you deny, Mr. Fenton, that you did tell them that? [655] A. No, I wouldn't deny it, but I don't recall stating it.

Q. Did you further tell them from then on you delivered your checks to Castorino? A. I don't recall that statement, either.

Q. Would you deny that you said that? A. No, but I don't recall it.

Q. Now, after you gave that statement to the FBI, did you have occasion to meet with any one of the present Union City Commissioners? A. I did not give that statement that you just mentioned. That statement was given out in the Federal Building in Newark.

Q. Do I understand you to say, Mr. Fenton, that you did not give a statement to the FBI in Union City? A. I didn't say I did not give them the statement, I said I do not recall giving them. But I do recall making that statement out in Mr. Heifetz's office in Newark.

Q. You mean the statement that when Galasso died, you were told by either Savarine or Dr. Philip Castorino, Galasso's replacement on the Board, that when you get the list to see Castorino? A. Please don't put words in my mouth. I was not told by anybody. Mrs. Camilli gave me an envelope.

Mr. Musto's name was on it. She told me to take it down to . . . .

[656] Q. Did you tell that to the FBI? A. Mr. Savarine, Mr. Castorino or nobody told me anything. I was given an envelope by Mrs. Camilli to take to Mr. Musto's house.

Q. Did you tell that to the FBI? A. Yes.
Q. You did? A. I did.

APPENDIX E

Document

FEDERAL BUREAU OF INVESTIGATION

Date 12/24/70

JOHN WILLIAM FENTON, 2010 Kerrigan Avenue, Union City, New Jersey, was interviewed in a Federal Bureau of Investigation (FBI) car at 2nd and New York Avenue. Prior to asking him any questions, he was furnished an "Interrogation; Advice of Rights" form, which he read, stated he understood, and signed. He then furnished the following information:

He has worked for the Union City Board of Education for the past 16 years and has had the position of Maintenance Supervisor for the past three and a half years. When he first obtained this position, "CHAPPIE" GALLASO (phonetic), who died about two years ago, was the Board of Education member in charge of maintenance.

Shortly after becoming Maintenance Supervisor, GALASSO gave FENTON a list with several names on it and told him to contact these people, tell them he was from the Board of Education, and he would receive from each of them an envelope containing a "political donation."

He has continued contacting various businessmen who deal with the city on an approximate monthly basis, since that time.

Document

He would know which businessmen to contact, since he would be handed a list containing names and amounts by either GALLASO or JENNIE CAMILLY (phonetic), secretary to PETE SAVARINE (phonetic), secretary to the Board of Education. The names and amounts would be taken from the vouchers sent out in payment of bills received by the Board.

Eventually FENTON realized that the envelopes and occasional cash received in this manner were kickbacks to the Board of Education. FENTON would never receive any portion of the cash collected in this manner, even though he contacted the various businessmen on his own time.

Shortly after beginning this collecting, he complained to GALLASO about doing this on his own time and using his own car and gas. GALLASO merely told him it was a part of the job. FENTON took this to mean that if he wanted to continue in his position he would continue the collections. FENTON earns about $ 00.00 monthly net.

When GALLASO died, FENTON was told by either SAVARINE or Dr. PHILIP F. CASTORINO, GALLASO'S replacement on the board, that when he gets the list to see CASTORINO. From then on he delivered his collections to CASTORINO.

His collections amounted to between $200.00 to $500.00 monthly.

FENTON identified the following firms as

business from whom he collected:

Mastro Lumber
Sherry Enterprises
Siegel and Son
Rassners Sports, 5911 Broadway, West New York
New Jersey
Royal Cleaners
Roosevelt Drugs
Siegel Paints
Rappaport
West Hoboken Plumbing

The following description was obtained through observation and interview:

Name	JOHN WILLIAM FENTON, also known as Bill
Date of birth	October 12, 1904
Place of birth	West Hoboken, New Jersey
Height	(illegible)
Weight	(illegible)
Hair	Gray
Eyes	Hazel, wears glasses
Residence	2010 Kerrigan Avenue, Union City New Jersey
Telephone	(illegible)
Wife	DOROTHY
Social Security Number	WILLIAM, age 41 (illegible)
Occupation	Maintenance Supervisor, Union City Board of Education
Arrests	None admitted.

Document

On 12/14/70 at Union City, New Jersey, File No. Newark 92-3889 by SA ANTHONY J. VACCARINO, SA JEROME J. PINO JJP/lmh Date dictated 12/18/70

This document contains neither recommendations nor conclusions of the FBI and is loaned to your agency; It and its contents are not to be distributed outside your agency.

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APPENDIX F

Excerpts from Trial Transcript of Testimony of Raymond Tobler

Direct Examination

[Commencing at 1262-6]:

> Q. Would you tell us how you became aware of that change? A. I was notified that in the future it would be handled as I just explained, it would be bought through the Board and I would be paid through the Board.
>
> Q. Now, sir, to the best of your recollection could you tell us who notified you of that? A. I am not certain, but I think it was Mr. Musto.
>
> Q. What, if anything else, did Mr. Musto or the person who contacted you [emphasis mine] tell you at that time? A. That there would have to be a ten percent payback or kickback on anything I sold to them.

Cross Examination

[Commencing at 1290-17]:

> Q. Is it true that the only persons that spoke to you or contacted you with reference to this situation is O'Malley and Fenton? A. Considering that this thing had been going on over a period of years, to the best of my knowledge these are the only people, yes.
>
> Q. And no other person? A. Except for my former statement about the call that

the instigation or the beginning of this arrangement.

[1291] Q. With reference to this call, was that in person or by telephone? A. Telephone.

Q. You never saw the person who called you?

Mr. Richardson: Objection, your Honor.

The Court: Permit the answer.

The Witness: I recognized the invoice [sic] recognizing the invoice I had seen the person, if it is whom I think it is, today, and I have told -- I have mentioned that man's name before.

Q. How many times have you -- we are talking now about what year? A. This original phone call?

Q. Yes. A. I can't pinpoint it, my friend, I just can't.

Q. Would you say it was more than ten years ago? A. It could be more or less. I just don't know. I'd have to look back in my records which are unavailable to me.

Q. And how many times did this person call you on the telephone? A. I recall only that once.

Q. Never spoke to you before on the telephone? A. I wouldn't say that.

Q. I am asking you. [1292] A. We are talking about this particular arrangement?

Excerpts

Q. No, I am talking about this particular person. A. I may have spoken with that person other times on the phone, but not in connection with the same question.

Q. How many times altogether would you say you have spoken to that person on the phone? A. I really can't tell you, I don't know. It wasn't many times. It may have been a few. It may have been over a period of years.

Q. To your knowledge, when was the first time that you spoke to that person on the phone? A. I can't tell you, I wouldn't know.

Q. To your best recollection, when was the last time you spoke to that person on the phone? A. I don't know. I don't keep a record of every phone call I make, my dear sir.

Q. Isn't it a fact that you really don't know to a certainty who the person who made the call actually was? [1293] A. You are correct. I already stated that I think it was this person who I mentioned.

Q. Then you honestly don't know? A. I can't certify --

Mr. Richardson: Objection.

The Court: Permit the witness to answer.

The Witness: I honestly don't know, that's right.

Excerpts

[Commencing at 1309-23]:

Mr. Freiman: If the Court please, I move that any testimony containing the identifications [1310] of the person making the telephone call to this witness about ten years ago or thereabouts be stricken from the record on the ground that it is absolutely an improper identification further on two grounds, first the witness testified --

The Court: I know what the witness testified, but Mr. Freiman, isn't that a matter for the jury and not a matter of law? He testified one thing on direct. And on cross-examination you were able to dilute that, and from here on in it's for the jury, not for the Court.

Mr. Freiman: I may say to your Honor that I would have made a motion if I understood his testimony. I thought on direct that it was a call personally and not by telephone. That was my understanding of the testimony, and had I made a motion then I am sure your Honor would have granted it and for that reason I make the motion now because it conclusively appears that there was no proper identification on the record and it would be unfair to a defendant to have that taken before the jury.

Mr. Richardson: On direct examination the witness identified Mr. Musto as the person who made the telephone call and it was clear and simple. He did

testify there was some doubt in his mind, but [1311] that he believed that the person who made the telephone call was Mr. Musto. It came out clear.

The Court: I remember that.

Mr. Freiman: He said "I think it was Mr. Musto." I thought that the reason he said "I think" was because of the remoteness of time, but had I been apprised that it was a telephone call and had I understood that it was by telephone, that would have stopped it right there. I think your Honor would have sustained my objection as your Honor has previously to similar questions where the words "I think" were used. Under those circumstances I think that the interests of my client demand this be stricken from the record.

The Court: I will not strike it from the record. I conceive this to be a matter for the jury to determine. It will go to the jury and you may argue on summation if you see fit, if we get to that point.

I will deny your application.

* * *

APPENDIX G

Excerpts from Trial Transcript of Testimony of Frank B. Siegel

Cross-Examination

[Commencing at 749-11]:

Q. Mr. Siegel, did anyone at any time with reference to these bills that are before you or with reference to any other bills that you submitted to the Board of Education, or with reference to any bids, purchases or any dealings that you had with the Board of Education, ever say or indicate to you that if you didn't pay 10 percent you wouldn't get the business? A. No.

Q. Did anyone at any time with reference to again the bills and the materials that you supplied to the Board of Education ever say to you that you would not get future business if you didn't pay the 10 percent? A. No.

APPENDIX H

Excerpts from Trial Transcript of Testimony of Louis Rassner

Cross-Examination

[Commencing at 968-3]:

Q. Now, were there times when you gave 10 percent as a kickback? A. Yes.

Q. Were there times when you on your own reduced it to 8 percent? A. Yes.

Q. Did you get any complaint about that? A. No.

Q. Were there times when you on your own reduced it to 5 percent? A. No, I don't think so. I don't remember -- there were -- if it was, it was very rare occasions.

Q. Did you testify before the Grand Jury? A. I did.

Q. In this case? A. I did.

Mr. Freiman: May the government, sir, give me the date of that testimony?

Mr. Richardson: February 25, 1971.

Q. And were you asked this question, and did you give this answer --

Mr. Richardson: May we have the page?

Mr. Freiman: Page 16, line 11.

[969] Q. "Question: Approximately what percentage of the total amount of your payment

from the Board of Education would you give to Fenton when he came around to collect? "Answer: About 5 to 8 percent."

Was that your answer to the question? A. If it is there I must have said it. I don't remember exactly what I said at that time. I am not accustomed to be sitting here, and what I said at that time I can't remember word for word.

Q. Well, did you reduce it to 5 percent at times? A. There might have been times when I may have.

Q. Was there any complaint? A. No.

Q. So that actually the amount of whatever you gave was solely in your discretion, wasn't it? A. Yes.

* * *

APPENDIX I

Excerpts from Trial Transcript of Summation of Counsel

By the government

[Commencing at 3478-8]:

> * * * That's how rotten this was. He didn't think of it because it was so ingrained in Union City, Hudson County, to kick back, so ingrained as a way of life --
>
> Mr. Freiman: If the Court please, I object to a mention of Hudson County.
>
> The Court: I will permit the summation to continue.
>
> Mr. Richardson: Thank you, your Honor.

[Commencing at 3491-7]:

> * * * That is the reason why John Powers was there. That is why Dr. Castorino called him in, and it's when he was counting that money, when Mary Zipf saw him. That is it. That is what happened, ladies and gentlemen. That is the cold, bare truth, and it continued every month. It continued. The progression that had started 15 years ago, handed down like a baton from dying collector to dying collector 15 years of corruption, 15 years that wasn't going to stop, and they weren't going to let any new member of the Board stop it.

Excerpts

Who appointed John Powers? Mayor Musto.

Who appointed Philip Castorino? Mayor Musto.

Mr. Simeone: It is not in the record that Mayor Musto appointed Savarine.

The Court: Sustain the objection.

Mr. Richardson: I submit that it is, your Honor. I asked that question of the witness myself.

The Court: I will accept your representation. I myself do not recall, but it is the jury's recollection which in any event will govern.

Mr. Richardson: The mastermind of this wasn't going to allow the new man to be appointed, who wasn't going to go along.

By Counsel for the defendant Powers

[Commencing at 3410-8]:

Reviewing the evidence as we have, and listening to the learned argument we have heard to date and anticipating those that I believe I might hear I can recall in times past that I believe there was one who came to this earth to try to make the world a better place to live in who ended up being hung between two thieves.

Excerpts

[Commencing at 3427-4]:

> I believe that the evidence shows you that Mr. John Powers is before you not because he is evil but because he is good, that his guilt must be -- to get you to believe in guilt by association. I have every reason to believe that the learned Court will tell you that you will judge each case individually. We are begging that you do judge each case individually. There is a broad brush that is painting and that broad brush could well include everyone unless -- unless you stop for just a moment and examine the type of person that John Powers is * * *

[Commencing at 3433-1]:

> Since John Powers has been on the Board of Education there has been a breath of life. There has been a change. All has been up to snuff. I believe the record shows in the documents, the stipulations, since Mr. Powers came on the Board.

APPENDIX J

Excerpts from Trial Transcript of Judge's Charge to the Jury

[Commencing at 3723-1]:

> A person cannot conspire with himself. Therefore, you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that there was at least one other person who participated with the particular defendant in a conspiracy as charged, and who had a common criminal intent. That other person must be another person named in the indictment as a co-conspirator, whether or not a defendant, or it could be in this case Mr. O'Malley, as to whom there has been some testimony.

APPENDIX K

Excerpt from Transcript of Proceedings at Sentencing, July 18, 1972.

By the Court, addressing the defendant Musto

[Commencing at 11-1]:

> * * * I can appreciate the problems that you speak about because the probation report, which is an excellent one, and which gives you a very good report --
>
> The Defendant: I don't hear you.
>
> The Court: I said the probation report made by our very excellent Probation Department is a very excellent one in your case.

[Commencing at 12-6]:

> The difficulty with this, Mr. Musto, is that it is true that this was not a crime of violence. It is also true that you do not impress me as being an individual who has criminal tendencies. So when Mr. Hornstein and Mr. Freiman refer to the fact of rehabilitation, I would doubt that a sentence which was designed for purposes of rehabilitation could properly be imposed under any logical nexus in this case.

Excerpts

[Commencing at 19-5]:

> The Court: Let me put your mind to rest. There is nothing in this probation report which would reflect any prior involvement with the law. As a matter of fact, it is a report of an individual who, I must say, Mr. Simione, should never be in court on a criminal charge. I will tell you that as in the case of Mr. Musto, it concludes with stating that his present conviction is in opposition with the image created by his life. It is an excellent report of what is otherwise an individual whom one should look to as being an outstanding community leader.

[Commencing at 27-7]:

> I can only regard the kind of activity which apparently took place in your community and with your assistance and with Mr. Musto's assistance as a crime not of violence but one that approximates the crime of treason.

APPENDIX L

Excerpt from Bill of Particulars Served by the Government on January 21, 1972.

3. The consent of the victims of the charged extortions was "induced both by fear of — or by the wrongful use of fear of — financial injury" in that the victims feared one or more of the following:

1. That the victim would not obtain future contracts to be performed on behalf of the Union City Board of Education.

2. That the victims would not be compensated for services rendered on behalf of the Union City Board of Education on existing contracts.

3. That payments due to victims for services rendered on behalf of the Union City Board of Education would be delayed.

4. That the victims would be unable to meet expenses incurred in the course of the performance of contacts on behalf of the Union City Board of Education.

And that this "fear was wielded by the defendants, acting in concert, by virtue of the authority and the apparent authority of some of them to impose these penalties upon the victims.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

Andrus v. *Turner*, 421 F.2d 290	9
Barnard v. *United States*, 342 F.2d 309, certiorari denied, 382 U.S. 948	8
Black v. *United States*, 269 F.2d 38, certiorari denied, 361 U.S. 938	10
Callanan v. *United States*, 223 F.2d 171, certiorari denied, 350 U.S. 862	4
Dunn v. *United States*, 284 U.S. 390	4
Hodge v. *United States*, 271 F.2d 52, certiorari denied, 361 U.S. 961	8
United States v. *Borelli*, 336 F.2d 376, certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960	6
United States v. *Gleeson*, 411 F.2d 1091	8
United States v. *Iozzi*, 420 F.2d 512, certiorari denied, 402 U.S. 943	4
United States v. *Jones*, 425 F.2d 1048, certiorari denied, 400 U.S. 823	7
United States v. *Kay*, 101 F.2d 270, certiorari denied, 306 U.S. 660	8
United States v. *King*, 420 F.2d 946, certiorari denied, 397 U.S. 1017	9
United States v. *Knox Coal Company*, 347 F.2d 33, certiorari denied *sub nom. Lippi* v. *United States*, 382 U.S. 904	6
United States v. *Kramer*, 355 F.2d 891, reversed on other grounds, 384 U.S. 100	4
United States v. *Lloyd*, 431 F.2d 160, certiorari denied, 403 U.S. 911	9
United States v. *Roviaro*, 379 F.2d 911	8

Page

United States v. *Stirone*, 262 F.2d 571, reversed on other grounds, 361 U.S. 212 ..... 6, 7

United States v. *Tobin*, 429 F.2d 1261 9

United States v. *Tropiano*, 418 F.2d 1069, certiorari denied, 397 U.S. 1021 4

Statutes:

Hobbs Act, 18 U.S.C. 1951 ..... 3, 4, 9, 10

Jencks Act, 18 U.S.C. 3500 5

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-946

PATRICK MUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the judgment of conviction (Pet. App. A) was entered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1972. The petition for a writ of certiorari was filed on January 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial showed that money had been taken from the victims as a result of fear or threats induced by the co-conspirators.

2. Whether the acquittal by the jury of one of the codefendants precluded a guilty verdict with respect to petitioner.

3. Whether the trial court properly declined to admit into evidence an F.B.I. report on the ground that petitioner had failed to lay an adequate foundation for it.

4. Whether the trial court erred in admitting testimony concerning conversations and transactions between petitioner and another individual, who was allegedly involved in the conspiracy but was not named as a co-conspirator in the indictment.

5. Whether the identification testimony of a witness who was a victim of the alleged extortion scheme was properly admitted.

6. Whether the trial court abused its discretion in limiting the time of summation by petitioner's counsel to one hour.

7. Whether certain remarks by the prosecutor during summation were unduly prejudicial to petitioner.

8. Whether petitioner's sentence of two and a half years' imprisonment was cruel and unusual punishment.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to extort and on eight substantive counts of extortion, in violation of the

Hobbs Act, 18 U.S.C. 1951. He was sentenced to two and one-half years' imprisonment on the conspiracy count, and, in addition, to a total of two years' probation on the other counts; he was also fined $20,000. The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that petitioner, President of the Union County Board of Education for 20 years prior to 1972, and other members of the Board used their positions to impose a system whereby businessmen could do business with the Board only if they paid kickbacks. The testimony of three unindicted conspirators—Savarine, Fenton, and Castorino—disclosed that a group of businessmen, whom the conspirators referred to as "the club", kicked back approximately ten per cent of the money they received from their sales to the Board; the funds so collected were distributed to the Board members and its architect. Representatives of thirteen firms that did business with the Board further testified that they paid the kickbacks because payment was a requirement of doing business. One of the witnesses characterized the system of official corruption as being so pervasive that it was "a way of life" (VI Tr. 1186).

ARGUMENT

1. Petitioner contends that the evidence at trial failed to show that the money was taken as a result of fear or threats induced by the alleged conspirators. But some of the representatives of firms making the payments testified that the kickbacks were understood as

prerequisites for doing business with the Board (IV Tr. 684, 747, 759; V Tr. 875-884, 954-956, 1019-1022; VI Tr. 1096-1098; VII Tr. 1358-1359, 1439); others stated they had been told to make the kickbacks if they wished to make sales to the Board (V Tr. 911-917, 1069; VI Tr. 1103-1105, 1174, 1262, 1290-1293, 1312-1315). Payments made as a result of fear of financial loss are precisely what Congress intended to reach under the extortion provision of the Hobbs Act. See, *e.g.*, *United States* v. *Iozzi*, 420 F.2d 512 (C.A. 4), certiorari denied, 402 U.S. 943; *United States* v. *Tropiano*, 418 F.2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021; *United States* v. *Kramer*, 355 F.2d 891 (C.A. 7), reversed on other grounds, 384 U.S. 100. Contrary to petitioner's claim, the fact that in some instances the fear of economic loss was traced to the conspirators' course of conduct over several years, rather than to a specific threat made at a particular time, does not remove from the statutory prohibition the exploitation of that fear to collect kickback payments. *Callanan* v. *United States*, 223 F.2d 171 (C.A. 8), certiorari denied, 350 U.S. 862.

2. Petitioner next seeks to overturn his conviction on the ground that the jury verdict of guilty as to him was inconsistent with the acquittal of codefendant Powers, who, the witness Castorino testified, had collected kickback payments and then divided the money among Powers, Castorino, and petitioner. There is, however, no requirement that a jury return consistent verdicts. *Dunn* v. *United States*, 284 U.S. 390. On this record, the jury might well have believed Castorino's testimony as to petitioner but not found it credible as

to Powers; it might also have based its guilty verdict on testimony of other witnesses who connected petitioner to the conspiracy. The fact that the jury concluded there was insufficient evidence to connect co-defendant Powers to the conspiracy is not a reason to disregard the evidence showing petitioner's participation in the extortion scheme.

3. Petitioner contends that the district court erred in refusing to permit him to introduce a report of an F.B.I. interview with unindicted co-conspirator Fenton because a proper foundation had not been laid for its admission. According to the report of the interview, Fenton then stated that, after the death of the Board member in charge of maintenance, he was told by Savarine or Castorino to deliver kickbacks to Castorino (Pet. App. E); in his trial testimony Fenton denied he had made the statement (IV Tr. 654-655). It was, however, only after both sides had rested that petitioner sought to introduce the report (X Tr. 3044). Petitioner also failed to make an effort to comply with the requirement that he establish a foundation for admissibility through the testimony of the agents who had conducted the interview, all of whom were present at trial. The court's ruling, therefore, properly conformed to the evidentiary rule requiring that a foundation must be laid for the admissibility of such documents. While petitioner asserts that there was no need to establish a foundation since the statement was delivered pursuant to 18 U.S.C. 3500 (the Jencks Act), the Jencks Act did not purport to affect the rules of evidence regarding the admissibility and use of statements produced pur-

suant thereto. *United States* v. *Knox Coal Company*, 347 F.2d 33 (C.A. 3), certiorari denied *sub nom. Lippi* v. *United States*, 382 U.S. 904.[1]

4. Relying on *Stirone* v. *United States*, 361 U.S. 212, petitioner argues that testimony connecting him with O'Malley, who allegedly collected money in furtherance of the conspiracy, should not have been admitted because O'Malley was not named in the indictment as one of the five conspirators. He claims that the admission of this testimony constituted an impermissible broadening of the indictment. But the indictment in this case charged a conspiracy to extort kickback payments; the testimonial references to O'Malley did not alter the character or nature of that alleged conspiracy. Unlike *Stirone*, the proof at trial did not pertain to a crime different from that charged in the indictment. The testimony about others who participated in the same extortion scheme but were not named as co-conspirators related to the same conspiracy as the one charged.

5. Petitioner also challenges the court's refusal to strike the testimony of one Raymond Tobler, who claimed he was a victim of the Board's extortion. Tob-

---

[1] The quotation cited by petitioner from *United States* v. *Borelli*, 336 F.2d 376 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960, is not in point. In *Borelli* the court held that, rather than forcing the defendant to rely solely upon the witness' admission that he had made a prior inconsistent statement, the complete prior inconsistent statement should have been admitted upon the defendant's motion. There is no indication in that case, however, that there was no foundation for the statement. Indeed, *Borelli* specifically stated that when a witness is confronted with and denies what appears to be an inconsistent statement, counsel's only recourse is then to call the agent who took the statement and endeavor to prove the contrary.

ler stated on direct examination that he had paid kickbacks beginning in about 1960, when someone, whom he believed to be petitioner, had told him that future sales were to be made through the Board of Education rather than directly to the county high schools, and that it would be necessary to pay a kickback of ten per cent on all such purchases made by the Board (VI Tr. 1260-1263). He also testified that he had periodically paid kickbacks until 1968, when he ceased to do business with the Board (VI Tr. 1263-1266, 1269). On cross-examination Tobler repeated that he could not "certify" that the person with whom he spoke was petitioner (VI Tr. 1292).

Petitioner argues that Tobler's testimony should not have been admitted because it concerned events commencing prior to the conspiracy charged in the indictment, and because it was not a positive identification. But the trial court was careful to instruct the jury that Tobler's testimony was only relevant to the conspiracy charged (VI Tr. 1258). Moreover, to the extent that the testimony indicated payments were made prior to commencement of the conspiracy charged, it was relevant to the question of intent and demonstrated a course of conduct that had contributed to a fear of economic loss among those in the community who sought to do business with the Board. Accordingly, it was properly admitted. See, *e.g.*, *United States* v. *Stirone*, 262 F.2d 571 (C.A. 3), reversed on other grounds, 361 U.S. 212; *United States* v. *Jones*, 425 F.2d 1048 (C.A. 9), certiorari denied, 400 U.S. 823. Nor does the fact that Tobler could not make a positive identification of

petitioner provide a basis for excluding his testimony indicating that he believed petitioner was the person with whom he spoke. As the judge correctly ruled (VI Tr. 1311), the identification testimony was a matter to be weighed by the jury. Moreover, in light of the testimony of Fenton and Castorino, who clearly connected petitioner with the conspiracy, petitioner's claim of prejudice as a result of Tobler's identification is not well taken.

6. Petitioner objects to the court's one-hour limitation of the summation to the jury by his counsel.[3] A court, however, has wide discretion in limiting the time for argument to the jury. *United States* v. *Roviaro*, 379 F.2d 911 (C.A. 7); *Barnard* v. *United States*, 342 F.2d 309 (C.A. 9), certiorari denied, 382 U.S. 948; *Hodge* v. *United States*, 271 F.2d 52 (C.A. 5), certiorari denied, 361 U.S. 961; *United States* v. *Kay*, 101 F.2d 270 (C.A. 2), certiorari denied, 306 U.S. 660. And a limitation granting each defendant in a multi-defendant case one hour to summarize is clearly a reasonable exercise of discretion. See *United States* v. *Gleeson*, 411 F.2d 1091 (C.A. 10), restricting several defendants to one hour jointly for closing arguments.

7. Petitioner also challenges the prosecutor's reference in closing argument to widespread corruption that the Board had engendered in the county. He complains particularly about the reference to petitioner's son, Mayor Musto, who appointed some of the members to the Board, and the characterization of him as the mastermind of the extortion scheme. But these re-

---

[3] The government was granted one hour and forty five minutes; each of the three defendants was granted one hour (XI Tr. 3319).

marks by the prosecutor were proper comments on the evidence introduced at trial (III Tr. 267; VII Tr. 1759).[3]

8. Finally, petitioner contends that his sentence of two and one-half years' imprisonment amounts to cruel and unusual punishment, since he is 79 years old. But petitioner's sentence was well within the maximum twenty years' imprisonment provided for in 18 U.S.C. 1951; nor was his fine of $20,000 excessive, since the statute would have permitted a fine of $10,000 on each of the nine counts for which he was convicted. The fixing of the maximum penalties for criminal acts is a legislative function, and the judicial decision setting the actual prison sentence within those statutory limits cannot be considered cruel and unusual punishment. See *United States* v. *Lloyd,* 431 F.2d 160 (C.A. 9), certiorari denied, 403 U.S. 911; *United States* v. *Tobin,* 429 F.2d 1261 (C.A. 8); *Andrus* v. *Turner,* 421 F.2d 290 (C.A. 10); *United States* v. *King,* 420 F.2d 946 (C.A. 4), certiorari denied, 397 U.S. 1017. This rule applies regardless of the age of the person upon whom the sentence is imposed, since that is simply one of the factors the district judge was called upon to weigh in exercis-

[3] Petitioner also asserts that he was prejudiced by the statement by co-defendant Powers' attorney at the beginning of his summation to the effect that he (the attorney) was "reminded of a person in times past who came to this earth to try to make the world a better place to live in [and] who ended up being hung between two thieves" (XI Tr. 3410). But when that quotation is read in context, it is clear that counsel was referring to Castorino and Savarine, the two government witnesses, and not to petitioner. The other statements of Powers' counsel to the effect that Powers was not guilty and that his presence on the Board was "a breath of life" were obviously also not directed against petitioner and in no way prejudiced him (Pet. App. I).

ing his discretion. *Black* v. *United States,* 269 F.2d 38 (C.A. 9), certiorari denied, 361 U.S. 938.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[4]

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
JOSEPH DAVIES,
Attorneys.

FEBRUARY 1973.

[4] This case does not raise any issues under the Hobbs Act that relate to the issue presently pending before the Court in *United States* v. *Enmons,* No. 71-1193 (the application of the Hobbs Act to violent tactics in a labor-management dispute), and there is thus no need to defer action on the petition pending a decision in *Enmons.*

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In The

Supreme Court of the United States

October Term, 1972

No. 72-946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

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INDEX

	Page
Petition for Rehearing	1

APPENDIX

Appendix A - Affidavit of Joseph L. Freiman .	1a
Appendix B - Affidavit of Nathaniel Lutz . .	3a
Appendix C - Reply Brief for Petitioner . .	5a

In The

Supreme Court of the United States

October Term, 1972

No. 72-946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner Patrick Musto respectfully prays that this Court grant him a rehearing of its denial of his petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit for the reasons set forth in the affidavits annexed hereto.

Wherefore, your petitioner prays that this Court grant him a rehearing of its denial of the petition for Writ of Certiorari, grant him permission to file the reply brief set forth in the appendix herein and grant his petition for the Writ of Certiorari.

Joseph L. Freiman
Attorney for Petitioner

Appendix A

Affidavit of Joseph L. Freiman

STATE OF NEW JERSEY)
)
COUNTY OF HUDSON)

JOSEPH L. FREIMAN, being duly sworn on his oath according to law, deposes and says:

1. On March 8, 1973, I sent to the printer a reply brief in the above matter with instructions to print same and mail it to this Court with copies to the Solicitor General of the United States.

2. I have been informed as set forth in the affidavit of the printer that the briefs were actually delivered to the United Parcel Service on March 14, 1973, for delivery to this Court. They were returned to the printer by the United Parcel Service because the driver could not find the office of the Clerk. The printer then mailed same to this Court. The briefs were received after this Court had denied the petition for the Writ of Certiorari.

3. I am of the belief that the reply brief, a copy of which is printed in the appendix, contained argument which would have persuaded this Court to grant the Writ of Certiorari. The failure to file the reply brief with this Court before the Court acted on the petition was clearly due to no fault of the petitioner or his attorney and the petitioner should not be penalized therefor.

It is therefore respectfully submitted that this Court in its discretion grant the petitioner a rehearing, permit the reply brief to be filed and grant the petition for the Writ of Certiorari.

s/ Joseph L. Freiman
Joseph L. Freiman

Sworn to and subscribed
before me this 22nd day
of March, 1973.

s/ Kathryn M. Kilduff

KATHRYN M. KILDUFF
Notary Public of New Jersey
My Comm. expires Nov. 19, 1974

Appendix B

Affidavit of Nathaniel Lutz

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MIDDLESEX)

NATHANIEL LUTZ, being duly sworn according to law, and being over the age of 21 upon my oath depose and say:

1. I am President of LUTZ APPELLATE PRINTERS, INC. having its principal place of business at 60 Main Street, South River, New Jersey.

2. On March 9, 1973, we did receive from Joseph L. Freiman, Attorney, a Reply Brief in the matter of Patrick Musto, Petitioner, vs. United States of America, Respondent, No. 72-946, to be prepared and sent to the Supreme Court of the United States and Irwin N. Griswold, Solicitor General.

3. Due to a labor problem in our plant, said Reply Brief was sent via United Parcel Service on March 14, 1973, to the Supreme Court of the United States.

4. Because of an error in the shipping department the Reply Brief was not sent to the Solicitor General, but was sent to the United States Attorney in Newark.

5. On March 20, 1973, the package containing said Reply Briefs addressed to the United States Supreme Court was returned to this office with a

notation requesting a more complete address, i.e.: room number.

6. On March 20, 1973, this package was re-wrapped and sent to the Supreme Court of the United States by First Class, United States Mail.

s/ Nathaniel Lutz
Nathaniel Lutz

Sworn to and subscribed
before me this 22nd day
of March, 1973.

s/ Lorraine Leotta
A Notary Public of the
State of New Jersey

LORRAINE LEOTTA
Notary Public of New Jersey
My Comm. expires April 13, 1977.

Appendix C

In The

Supreme Court of the United States

October Term, 1972

No. 72-946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Statement 1

Conclusion 5

Table of Citations

CASES CITED:

Dunn vs. United States, 284 U.S. 390 . . . 2

Rosenthal vs. United States, 276 F.714 (C.C.A. 9) (1921) 2

United States vs. Bass, 404 U.S. 336, 349 . . 4

United States vs. Enmuns et al., (No. 71-1193) 4

United States vs. Knox Coal Company, 242 2d 33 (C.A. 3) 2

STATUTES CITED:

Hobbs Act 1, 2, 4, 5

Jenks Act 2, 3

In The

Supreme Court of the United States

October Term, 1972

No. 72 - 946

PATRICK MUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

1. Petitioner, by way of reply to the argument of the Government, would point out that the Hobbs Act provides that "extortion means the obtaining of property — by wrongful use of actual or threatened force, violence or fear" which must of course, run from the defendants, is not applicable to a case where, as here, there has been no testimony whatsoever that anyone was told by anyone that unless they paid money they would not get the business.

It was also admitted by every witness who testified concerning that matter, that bids were always awarded to the lowest bidder no matter who it was.

Clearly the acts for which this defendant was convicted were insufficient to fall within the interdiction of the Hobbs Act.

2. It should be pointed out that the Government's Second Point cites Dunn vs. United States, 284 U.S. 390 for the proposition that inconsistent verdicts are permissible. Dunn involved inconsistent verdicts with respect to a single defendant. The only case involving inconsistent verdicts as to several defendants was Rosenthal vs. United States, 276 F.714 (C.C.A. 9) (1921), cited in my petition for the Writ of Certiorari.

3. As to the Government's Third Point, counsel has examined United States vs. Knox Coal Company, 347 2d 33 (C.A. 3) and all the cases cited in connection with the discussion of the Jenks Act as found on page 47 of said Opinion. None of them raise the question as to whether or not the material furnished by the Government can be introduced without testimony of the F.B.I. agent who took the statement. The statement in the footnote found on page 6 of the Government's brief that Borelli specifically stated that when a witness is confronted with and denies what appears to be an inconsistent statement counsel's only recourse is then to call the agent who took the statement and endeavor to prove to the contrary, is mistaken. Counsel refers to pages 392 and 393 of the Opinion. There is no such statement there.

There is no reported case wherein the question of admissability of Jenks material into evidence has been decided by this Court or any Circuit Court of Appeals. This Court should grant Certiorari in order to decide once and for all whether Jenks material furnished by the Government is admissible without aliunde testimony.

4. With reference to the Government's Fourth Point, it must be borne in mind that the testimony concerning payments made to O'Malley ended right there. There was no testimony that any of the payments received by O'Malley went anywhere else. Furthermore, those who testified concerning payments made to O'Malley were not the victims mentioned in the indictment but were others whose testimony was received over objection of the defendant.

Under those circumstances, the charge of the Court permitting a conviction if petitioner conspired with O'Malley (App. J) clearly violated petitioner's constitutional rights.

5. The Government misconceives the challenge to the Court's refusal to strike the testimony of Tobler as set forth in its Fifth Point. The conversation that Tobler had was a telephonic conversation and when that fact was developed for the first time on cross examination, counsel then moved to strike the testimony on that ground and on the other grounds as set forth therein. The Government's attempts to bolster Tobler's testimony by alluding to the testimony of Fenton and Castorino, who incidentally are the only witnesses

who in any way attempted to connect this defendant with the conspiracy. The jury evidently did not believe Castorino's testimony as discussed in the Petition for the Writ of Certiorari. The defendant did not have the opportunity to impeach Fenton's testimony and Tobler's testimony was completely inadmissible. It was upon this testimony that the defendant was convicted. Clearly the conviction should not be permitted to stand.

6. This Court on February 22, 1973, decided the case of United States vs. Enmuns et al.(No. 71-1193). It reiterated that the Hobbs Act being a criminal statute must be strictly construed and any ambiguity must be resolved in favor of lenity. It also held that the Acts interdicted must be explicit so as to lead to the conclusion that Congress intended to put the Federal Government in such a position which would work an unprecedented incursion into the criminal jurisdiction of the States, and reaffirmed its decision in United States vs. Bass, 404 U.S. 336, 349, where it said:

> "(U)nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the State ... (W)e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

It is respectfully submitted that the conviction in the case sub judice also goes far beyond what the Hobbs Act intended to interdict. If there has been a violation of criminal law, the several states are well able to vindicate same.

Conclusion

It is therefore respectfully submitted that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

Joseph L. Freiman
Attorney for Petitioner